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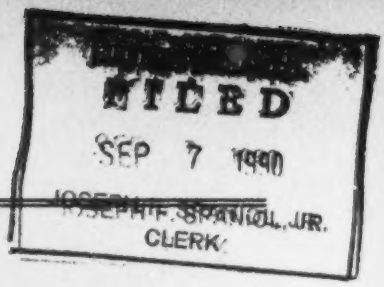
No. 90-189



In The

Supreme Court of the United States

October Term, 1990

FRANK LANDRY, et al.,

Cross-Petitioners,

v.

TACA INTERNATIONAL AIRLINES, S.A.,
AIR LINE PILOTS ASSOCIATION, INT'L, AFL-CIO,
and CHARLES J. HUTTINGER

Cross-Respondents.

On Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF CROSS-RESPONDENT TACA INTERNATIONAL AIRLINES, S.A. IN OPPOSITION TO THE CROSS-PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

SINCE THE SIX-MONTH LIMITATION ESTABLISHED IN *DEL COSTELLO v. INTERNATIONAL BROTHERHOOD OF TEAMSTERS*, 462 U.S. 151 (1983) EXPIRED, DID THE COURT BELOW PROPERLY BAR PLAINTIFFS' SUIT AGAINST THEIR UNION FOR BREACH OF FAIR REPRESENTATION AND THEIR EMPLOYER FOR ENTERING INTO A COLLECTIVE BARGAINING AGREEMENT, WHICH PLAINTIFFS BENEFITTED FROM DUE TO THEIR ELECTION UNDER THE AGREEMENT TO OBTAIN THE VERY RESULT OF WHICH PLAINTIFFS COMPLAIN?

LIST OF PARTIES TO THE PROCEEDING

TACA International Airlines, S.A. ("TACA") was a Defendant in the District Court and an Appellee in the Court of Appeals. TACA is Respondent and Cross-Respondent in this Court.

Air Line Pilots Association, International AFL-CIO ("ALPA") and Charles J. Huttinger ("Huttinger") were Defendants in the District Court, Appellees in the Court of Appeals, and are Petitioners and Cross-Respondents in this Court.

Fringe Benefit Administrators, Ltd. was a Defendant in the District Court, an Intervenor in the Court of Appeals, and is a Respondent and Cross-Respondent in this Court.

Plaintiffs in the District Court, Appellants in the Court of Appeals, and Respondents and Cross-Petitioners in this Court are: Frank Landry, Jules Corona, Charles South, Robert A. Massa, Don Johnson, T.Q. Howard, Joe Hass, Walter Keller, Don Jenkins, Emile Cerisier, and M. Letona ("Plaintiffs"). The following were plaintiffs in the District Court but were not Appellants in the Court of Appeals and are not Respondents or Cross-Petitioners in this Court: Thomas Brignac, Robert Lukenbill, Bert Haffner, and Gary Zyriek.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

No. 90-189

In The

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OPINIONS BELOW

The opinion of Court of Appeals is reported at 901 F.2d 404, and is reproduced at App. A.[1] The opinions of

[1] "App. ___" refers to the Appendix annexed to the Petition for a Writ of Certiorari submitted by ALPA and Huttinger in this case. (No. 89-1925). "R.___" refers to the record on appeal.

the Court of Appeals on petitions for rehearing are reported at 901 F.2d 404, 487, and are reproduced at App. H and App. I. The unreported opinions of the United States District Court for the Eastern District of Louisiana are reproduced at App. C through App. E. In addition to the foregoing, TACA and ALPA were involved in prior litigation which is relevant, and is referenced here, and officially reported as: *Air Line Pilots Association, Int'l, AFL-CIO v. TACA International Airlines, S.A.*, Civil No. 83-6238 (E.D. La.), *affirmed Air Line Pilots Association, Int'l, AFL-CIO v. TACA International Airlines, S.A.*, 748 F.2d 965 (5th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985) (hereafter referred to as *"ALPA v. TACA"*).

STATUTE INVOLVED

Section 10(b) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(b), is reproduced in the Cross-Petitioner's Appendix at pages BB4 and BB5.

STATEMENT OF THE CASE

Pursuant to Rule 15.1, TACA takes issue with the Statement of the Case submitted by Plaintiffs, as Cross-Petitioners, and therefore has set forth below the following relevant factual background (with references to the record):

TACA is the international airline of El Salvador. *ALPA v. TACA*, 748 F.2d 965 at 967 (5th Cir. 1984). *See also* App. A, 2a. In 1969 shortly after TACA entered into its

first agreement with ALPA, the Republic of El Salvador requested TACA to relocate its pilot base from New Orleans to El Salvador. *ALPA v. TACA, supra* and App. A, 2a. When TACA began compliance with the request, ALPA sought and obtained an injunction, maintaining that if the relocation occurred the collective bargaining agreement would be abrogated by Salvadoran law which would bar ALPA's representation of the pilots. *ALPA v. TACA, supra* and App. A, 2a. The Court of Appeals affirmed the District Court injunction, holding that the pilot base dispute was a "major dispute" which was subject to the Court's jurisdiction. *ALPA v. TACA, supra* and App. A, 2a.

In October of 1979, TACA and ALPA entered into a collective bargaining agreement which was amendable as of December 31, 1983. *ALPA v. TACA, supra,* at 968 and App. A, 3a. On April 19, 1982 the governments of the United States and El Salvador executed a Civil Aviation Agreement designed to regulate and promote air transportation between the two countries. *ALPA v. TACA, supra.* In October of 1983, TACA and ALPA in accordance with the collective bargaining agreement terms as to duration, commenced re-negotiations. *ALPA v. TACA, supra.*

However, on December 20, 1983 the Republic of El Salvador adopted a new Constitution; Article 110, § 4 of that Constitution provided that Salvadoran public service companies will have their work center and base of operations in El Salvador. *ALPA v. TACA, supra* and App. A, 3a.

As a result, on the following day the Salvadoran Ministry of Labor officials ordered TACA to remove its

pilot base to El Salvador. TACA immediately notified its pilots that the base would be moved; new individual contracts including substantial changes would be executed; and ALPA could no longer be recognized as the pilots' bargaining agent. Pilots were given until December 31, 1983 to accept the new terms or lose their employment with TACA. Meanwhile, because of the potential that the pilots would not move, TACA began advertising for new pilots; and ALPA sought injunctive relief which was granted by the Federal District Court. *ALPA v. TACA, supra* and App. A, 3a.

The Court of Appeals affirmed the injunction, ruling that collective bargaining "with the pilots choice of ALPA as their bargaining agent" (*ALPA v. TACA*, at 967) must occur. The Court also noted that in "an Oliver Wendell Holmes lecture at Harvard Law School, entitled 'Reason, Contract, and Law in Labor Relations,' " Dean Harry Schulman had observed that:

> "Collective bargaining is today, as Brandeis pointed out, the means of establishing industrial democracy as the essential condition of political democracy, the means of providing for the workers' lives in industry the sense of worth, of freedom, and of participation that democratic government promises them as citizens."

ALPA v. TACA, at 968.

As a result the Court of Appeals rejected TACA's position that "relocation of its pilot base is authorized by the Air Transportation Agreement, an Executive Agreement" which provided for an arbitration mechanism. *ALPA v. TACA*, at 968-969. In addition, notwithstanding the act of state doctrine and the participation of the

Republic of El Salvador in support of TACA's position (by virtue of filing an *amicus curiae* brief, *see ALPA v. TACA*, at 967), explaining the change in the relationship between TACA and ALPA due to the Republic of El Salvador's mandate, the Court of Appeals ruled that modification in the collective bargaining agreement "must be made in a manner consistent with controlling provisions of United States law, specifically and primarily the Railway Labor Act." *ALPA v. TACA*, at 971.

The Court of Appeals confirmed that it was not preventing the relocation of TACA's pilot base but, rather, requiring "collective bargaining" which was a "cornerstone of our national labor policy", ruling:

> "We neither hold nor suggest that TACA may not relocate its pilot base. We hold only that TACA must relocate its pilot base, and effect the other intended steps in accordance with the substantive law and procedures set forth in the Railway Labor Act and other relevant domestic laws."

ALPA v. TACA, at 972 and App. A, 3a-4a.

Prior to, and after the foregoing Court of Appeals ruling (and denial of *certiorari* by this Court), TACA and ALPA bargained under the auspices of the National Mediation Board. App. A, 4a. TACA and ALPA on July 24, 1985, the eve of a release by the National Mediation Board, reached an agreement. App. A, 4a.

Plaintiffs are pilots who were provided under the agreement reached with the option of continuing to fly with TACA from the pilot base to be relocated in El Salvador, or opting to terminate their employment and to receive severance, pass and other benefits. App. A, 4a. Plaintiffs opted to obtain such severance pay and benefits, payable only under the agreement which they now

complain of; and, thereafter Plaintiffs processed grievances under the agreement (which they now complain of) to an ultimate settlement which enabled them to receive additional monies. App. A, 4a-5a. *See also* App. B, 73a. Plaintiffs delayed more than a year from the date of the agreement under which they opted to obtain and accepted severance pay and other benefits (and more than six months after the conclusion of the arbitration proceedings and a settlement agreement which enabled them to obtain additional benefits). Then, Plaintiffs instituted the litigation which was barred by the Court of Appeals below, in the decision of which Plaintiffs complain. App. A, 5a-18a.

Plaintiffs in the proceedings below maintained that:

1. ALPA breached its duty of fair representation. Plaintiffs asserted that in the course of the negotiations, pilots engaged in sabotage of equipment. Plaintiffs repackaged their hybrid labor law claims as RICO allegations; Plaintiffs asserted they were aware of, and observed (and participated in), alleged sabotage, which they did not previously object to, or notify TACA (or any other party) of, despite Plaintiffs' prior alleged knowledge.[2]

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[2] Plaintiffs' complaint alleged that "within a span of approximately two months five aircraft engines on separate TACA in-service planes were purposely damaged either directly or at the instruction and encouragement of two of the ALPA member pilots who were not plaintiffs to this complaint." Complaint, paragraph 16 (R. 7). Plaintiffs alleged their knowledge of a conspiracy to sabotage planes of TACA, which not only damaged TACA equipment but risked lives of all aboard the aircraft. Plaintiff Emile Cerisier submitted a Declaration dated December 7, 1986 in which he stated that in "the

(Continued on following page)

Plaintiffs also alleged, without any factual support, that TACA entered into an agreement that it would not sue ALPA (and pilots),[3] if ALPA would enter into

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(Continued from previous page)

Spring of 1985" prior to the agreement when he was flying as a "co-pilot on a TACA flight" he observed a pilot "flying as captain of that flight" (not named as a plaintiff or a defendant) perform "several in-flight and ground acts that could have caused damage to the aircraft engines which would have put the lives of the passengers, crew, and ground personnel in danger." (R. 300). Plaintiff Cerisier outlined in his Declaration in paragraph 3 (R. 300) actions which he claimed "caused" use of "an excessive amount of fuel" at great cost to TACA; involved deliberate throwing away of an "oil cap of one of the engines which could have grounded the airplane"; involved leaving "the takeoff power in excess of the rated 5 minutes, which casues [sic] the engine to overheat"; involved deliberate use of an "engine igniters" which could cause the "igniters to burn up and prevent a relight of the engines." (R. 300-301).

Plaintiff Cerisier did not in any way indicate that TACA had knowledge of such observations prior to the service of his affidavit on TACA. Plaintiffs never explained why they could come forward only later during their litigation with such allegations as to what they observed but did not report this type of conduct when it occurred, or could have been prevented.

Plaintiffs never sought relief which would require that Plaintiffs and others return the monies that they took as severance pay (or pay the necessary damages to make TACA whole for the alleged acts of sabotage which they have described in their affidavits).

[3] There is no evidence that any such agreement not to sue was entered into by TACA. TACA has never waived any rights it may have to sue ALPA and each and every Plaintiff or pilot or person in any way involved in sabotage or improper destruction of TACA property. However, for purposes of argument it was assumed in connection with the motion of TACA

(Continued on following page)

an agreement allowing the relocation of the pilot base and the termination of the existing collective bargaining agreement.[4]

2. Plaintiffs alleged that the agreement to eliminate the funding of the pension (as well as the failure to establish a pension, which under the agreement between TACA and ALPA was the obligation of ALPA *see* R. 114-117 and App. A, 21a at n. 33, paragraph 5), was a breach of ERISA. *See* for Plaintiffs' allegations R. 11-14.

TACA and ALPA filed motions to dismiss (and in the case of ALPA in the alternative for summary judgment). TACA maintained that:

1. Plaintiffs' Complaint which was filed on July 23, 1986 to challenge the agreement entered into on July 24,

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(Continued from previous page)

to dismiss that such an agreement not to sue existed. If it had existed (which is contrary to fact) TACA submits any such agreement would have been a benefit for Plaintiffs (in that their allegations and affidavits establish their exposure to tremendous liability). TACA did not before, and does not, now in any way waive its rights against Plaintiffs or any other party or person.

[4] The allegations of Plaintiff Robert A. Massa that ALPA deliberately postponed negotiations with TACA to force a termination buy-out, demonstrate that if the negotiations had occurred faster (and there had been a release, TACA might have been able to relocate without the need for a termination buy-out (R. 359). They do not suggest that the "buyout" agreement of July 1985, under which Plaintiffs all opted to accept (and received substantial severance pay and benefits in 1985) or the subsequent settlement were a secret. *See* App. 5a; R. 67-69.

1985 (almost a year earlier) and the settlement of grievances under that agreement, on December 17, 1985, was precluded by the applicable six months statute of limitations.

2. TACA had no obligation to continue payments to a pension; and, as a practical matter, the administration of the pension had nothing to do with TACA, since it was not a fiduciary nor a party to the arrangements establishing the pension. *See* App. A, 21a at n. 33, paragraph 5 and R. 114-117; 129-183.[5]

TACA, as the record demonstrates, negotiated as an employer with ALPA, a union. TACA lacked control over

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[5] TACA's arrangement with regard to funding a retirement plan, specifically provided that TACA was only to make contributions based upon certain circumstances, in which a pilot crew member had been eliminated (App. A, 20a-21a and *see* 21a, n. 33; R. 114-117). The funding which Plaintiffs maintain TACA had an obligation to continue beyond the agreement arose out of an agreement which reduced the flight deck crew members and, in return, created solely as a collective bargaining agreement obligation of TACA an extra fixed payment requirement (App. 21a, n. 33; R. 114-117).

The payment obligation of TACA was only to submit defined contributions. ALPA specifically was charged with determining specifics of the plan fund. TACA had no role in determining how, or when, any pension fund might be established. *See* paragraph 5 of the agreement (App. A, 21a-22a, and 22a, at n. 33, paragraphs 5 and 6; R. 116). TACA was neither a signatory nor a party to the plan agreement, establishing the plan (App. A, 33a; R. 183). ALPA maintained that it selected a fiduciary, ultimately Fringe Benefit Administrators, Ltd. and ALPA was removed from the administration and maintenance of the fund (which was delegated to the fiduciary).

the representatives designated by ALPA for the purpose of bargaining. Not merely Huttinger, but other representatives including John Bradley,[6] a contract administrator from ALPA, negotiated with TACA. The negotiations involved were under the auspices and direction of the National Mediation Board. *See* R. 75-76 and App. A, 4a; and, for Plaintiffs' confirmation that mediator Charles Callahan of the National Mediation Board conducted the negotiations, *see* (R. 319 and 324). Plaintiffs never claimed that TACA selected, or could have selected representatives, for ALPA. TACA maintained below that, as a matter of law, it had no control over bargaining representatives of ALPA.

With regard to all actions of ALPA and Huttinger, Plaintiffs were in a position to complain at any time during negotiations. Plaintiffs were free at the time of the collective bargaining agreement on July 24, 1985 which was communicated to them by TACA (App. A, 4a,

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[6] The alleged election irregularities were all time-barred. As to those asserted irregularities relating to Huttinger, ALPA indicated that there were no irregularities. *See* Second Declaration of John Bradley (R. 353-354) confirming that Plaintiffs were confused between the nomination process and the election and there were no irregularities. However, even assuming there were irregularities, for the purpose of argument, the elections of Huttinger referred to were in February and July of 1985, which confirmed the allegations were time-barred. It is difficult to understand how TACA can be accused of improper concealment of activities involving elections in which Plaintiffs engaged (and would have first hand knowledge of), or how TACA would be able to reject any representative that Plaintiffs sent to the bargaining table, in view of the labor law which precludes management from objecting to the representatives of labor and this Court's specific ruling requiring bargaining with ALPA. *ALPA v. TACA*, at 967.

14a-15a; and E, 92a; R. 504) to opt to terminate their employment and accept monies for severance pay (as they did), or to continue their employment. App. E, 92a-93a. Plaintiffs are all individuals who specifically refused to continue to fly for TACA. Plaintiffs demanded that they be paid, and received, severance pay and benefits (App. A, 5a) (in excess of $400,000.00). Plaintiffs demonstrated that they were aware of the nature of the arrangements and agreements reached by virtue of their demands for the severance pay and benefits and their additional grievances (under the agreement now complained of) enabling them to obtain additional monies (App. A, 5a; R. 185-190).

TACA and ALPA after further proceedings moved for dismissal or, in the alternative, for summary judgment. TACA noted among other points that the parties could have bargained through impasse and exhausted procedures under the Railway Labor Act, at which point TACA could have effected relocation of its pilot base without providing any financial payments. In that case, Plaintiffs would not have received anything other than the right to strike and walk a picket line. *See* R. 591.

The District Court in its rulings found Plaintiffs' claims in issue here time-barred. App. E, 95a. The District Court also ruled, among other findings relevant here that many of Plaintiffs' RICO allegations related to their time-barred, hybrid labor law claims (App. B, 73a; R. 1299).

The District Court also concluded that Plaintiffs' allegations that ALPA engaged in improper activities "for the

benefit of the union" and, then, was placed in a position of being "pressured" by TACA to agree to the relocation could not constitute a basis for Plaintiffs to seek relief. App. B, 78a. In addition, the District Court and the Court of Appeals noted that the alleged sabotage (which Plaintiffs argued that they observed, but TACA maintained would make them co-conspirators) had involved damage to TACA and as alleged by Plaintiffs "was intended to provide the pilots with an advantage in the form of bargaining concessions. It was not intended to deprive them of any rights". App. A, 45a. As a result Plaintiffs would not have sustained a "direct injury" which would enable them to proceed. (R. 1304).

The Court of Appeals affirmed the decision of the District Court and the grant of summary judgment to ALPA and TACA on the duty of fair representation and breach of contract claim on limitations grounds. The Court of Appeals ruled: "A straight-forward application of *Del Costello*, as it has evolved, compels this result." (App. A, 18a). The Court of Appeals also affirmed the District Court's determination that there were no grounds for equitably tolling the limitations (App. A, 15a-16a), or reopening the earlier litigation between TACA and ALPA (App. A. 16a-17a) or permitting Plaintiffs to avoid the limitations bar by trying to re-characterize the Defendants' actions as an improper decertification of ALPA as a bargaining representative (since even if arguably this could be asserted, it was within the exclusive jurisdiction of the National Mediation Board, which had supervised the negotiations complained of by Plaintiffs) (App. A, 17a and 18a).

The Court of Appeals dismissed the RICO claim against TACA but reversed as to ALPA and Huttinger. The Court of Appeals reversed the grounds of summary judgment on the ERISA claim as to ALPA and TACA.[7]

The Court of Appeals also granted in part and denied in part a petition for rehearing that was filed by ALPA and Huttinger with regard to matters that are not relevant here and also denied petition for rehearing filed by TACA.

SUMMARY OF THE ARGUMENT

Plaintiffs' assertion that the six-month limitation period provided for under *Del Costello* is inapplicable to their suit, based on facts involved here and *Chauffeurs, Teamsters and Helpers, Local 391 v. Terry*, 110 S.Ct. 1339 (1990), is incorrect. *Del Costello* and subsequent cases have recognized no such basis for distinction as is asserted by Plaintiffs here (nor do Plaintiffs cite any such cases). Plaintiffs are deliberately confusing the right to a jury trial, mandated by constitutional law, with their request for application of diverse and differing state limitations period. The *Del Costello* limitations period is mandated by national labor law, which is not in any way

[7] The Court of Appeals noted that although TACA was only obligated to make contributions, and under the agreement ALPA had the responsibility for setting up and administering the pension, there could be a question of fact to be explored on remand – as to whether TACA "undertook actual obligations" under Section 9.9 or any other Section of the plan. App. A, 33a at n. 52.

inconsistent with the type of remedy-characterization used to determine a constitutional right to trial by jury in *Terry, supra*. With respect to constitutional considerations, a uniform federal limitations period would be required to ensure the supremacy of the federal labor laws. Thus, Plaintiffs' argument for review here is based upon improper confusion of the constitutional right to trial by jury and Plaintiffs' result-oriented effort to apply varying state limitations statutes to the Railway Labor Act to avoid a uniform federal limitations bar to their claims. Plaintiffs' argument is also precluded by the constitutional considerations which this Court has previously confirmed to be the basis for uniform federal labor law in *Del Costello*.

REASONS WHY THE WRIT SHOULD BE DENIED

I. *DEL COSTELLO* IS APPLICABLE TO PLAINTIFFS' HYBRID DUTY OF FAIR REPRESENTATION AND BREACH OF CONTRACT CLAIM.

Plaintiffs have not provided any basis for requesting reconsideration, or destruction, of the *Del Costello* limitations period.

A. In *Del Costello* the six-month limitations period for unfair labor practices, set forth in Section 10(b) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(b), was found applicable to duty of fair representation and breach of contract claims for unfair labor practices. The Court found a resemblance between duty of fair representation claims and unfair labor practices. The Court concluded that the six-month limitation established the proper balance between the national interest and

stable bargaining relationships and finality of private settlements, as well as interests of employees in remedying effects of alleged unjust union conduct. The Court rejected arguments "that the Rules of Decisions Act, 28 U.S.C. § 1652 [28 U.S.C.S. § 1652], mandates application of state statutes of limitations whenever Congress has provided none." *Del Costello*, 462 U.S. 159, n. 13. The Court confirmed the importance of uniformity for the purposes of the national labor law because the alternative, which might use state statutes of limitations, could result in a radical variation in the treatment of cases that are not significantly different substantively. 462 U.S. 161.

In federal labor matters under the NLRA, employers can be required to recognize unions in more than one jurisdiction. However, in connection with the Railway Labor Act, there is an even more of an emphasis on interstate, or system-wide, recognition and the need for uniformity. This is because the NLRA establishes an "appropriate unit" at a site-by-site location. While there can be national units under the NLRA, in each case the facts are analyzed to establish an appropriate unit. *See* Section 9, NLRA, 29 U.S.C. § 159. There is no NLRA requirement that a company which is national in scope have a system-wide unit. The Railway Labor Act was designed, and is interpreted by the National Mediation Board, to promote system-wide unionization in groups, which are not referred to as "units" but rather "class or crafts". *See* Rehmus, *The National Mediation Board at 50*, 16 (NMB 1984). The reason for this was that interstate transportation systems if shut down at one location, by definition, are usually systems which come to a total halt. *Ibid.* Shutting down a segment of a railroad line or a hub of an

airline can disrupt an entire system. *Ibid*. Thus, there is a mandate for national and uniform federal labor policy on interstate carriers; and for that reason, even the designating of bargaining groups, or classes or crafts, under the Railway Labor Act was system-wide, to prevent fractionalization of employee groups and to ensure system-wide bargaining units designed to prevent interruptions. *Ibid*. As a result, the Railway Labor Act with its system-wide structure of bargaining favors a national uniform limitations period even more than the NLRA.

B. The application of *Del Costello* to not only the NLRA but the Railway Labor Act has been uniform.[8] There is no distinction between duty of fair representation and breach of contract claims based upon the way by which the Plaintiffs may choose to proceed. Thus, whether the Plaintiffs sue only a union or sue a union and employer, or whether the Plaintiffs complain of processes involving negotiating agreements or enforcement of agreements is irrelevant as to the limitations period. *Del Costello, supra* at 462 U.S. 163. The concept of the duty of

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[8] *See* App. A, 11a and App. E, 95a. *See also Kelly v. Burlington Northern R.R.*, 896 F.2d 1194, 1197 (9th Cir. 1990); *Alcorn v. Burlington Northern R. Co.*, 878 F.2d 1105, 1108 (8th Cir. 1989); *Bailey v. Chesapeake and Ohio Ry. Co.*, 852 F.2d 185, 186-187 (6th Cir. 1988); *Smallakoff v. Air Line Pilots Ass'n Int'l*, 825 F.2d 1544, 1545-1546 (11th Cir. 1987); *Triplett v. Bhd. of Ry. Clerks, Local 308*, 801 F.2d 700, 702 (4th Cir. 1986); *Brock v. Republic Air Lines, Inc.*, 776 F.2d 523, 525-526 (5th Cir. 1985); *United Indep. Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1262, 1269 (7th Cir. 1985); *Welyczko v. U.S. Air, Inc.*, 733 F.2d 2[illegible]40 (2d Cir.), *cert. denied*, 469 U.S. 1036 (1984); *Sisco v. Consolidated Rail Corp.*, 732 F.2d 1188, 1192-1193 (3d Cir. 1984); *Barnett v. United Air Lines, Inc.*, 738 F.2d 358, 362-364 (10th Cir.), *cert. denied*, 469 U.S. 1087 (1984).

fair representation litigation involves the process basic to collective bargaining, the "consensual processes that federal labor law is chiefly designed to promote – the formation of the collective agreement and the private settlement of disputes under it." *See e.g. Del Costello, supra,* at 462 U.S. 163.

There have not been any decisions subsequent to *Del Costello* which in any way suggest the limitations period, Plaintiffs incorrectly argue for here. Plaintiffs fail to cite any support for their arguments seeking review.

II. PLAINTIFFS' RELIANCE ON *TERRY* IS BASED ON THE INCORRECT ASSERTION THAT *TERRY* SUGGESTS A REASON TO REVISIT THE CONCEPT OF THE LIMITATIONS PERIOD IN *DEL COSTELLO* WHILE *TERRY* CONSTRUED A CONSTITUTIONAL RIGHT TO A JURY TRIAL.

This Court in *Terry* found that it was obligated, due to the constitutional right to a jury trial, to analyze a remedy and determine if it were similar to one that might be found at common law. Assuming for the purpose of argument that in *Del Costello* characterization of the remedy did not consider a trust analogy and that *Terry* did, the characterization of the remedy regarding a constitutional right to jury trial does not in any way suggest a need to revisit the application of the federal six-month limitations period. To the contrary, *Terry* involved a constitutional right to a jury trial that has been long regarded as a special constitutional right. *See Terry, supra* 108 L.Ed.2d 527-528; 537-538; and 540 (confirming the constitutional duty to "scrutinize any proposed curtailment of the right to a jury trial"). National labor policy deferred

to the constitutional right to a jury trial but even if, as a result of the recognition of the constitutional right to jury trial it could be argued that a trust analogy might be used, there is no concomitant constitutional mandate that limitations period be re-designed or that state laws be applied to fragment national labor policy. To the contrary, there is no constitutional reference to a limitations period (as there is to a right to jury trial). The concept of a uniform limitations period is consistent with all constitutional concepts that should be considered and is actually mandated by any constitutional considerations if the national labor policy is to be uniform. *See Del Costello,* 462 U.S. 161.

As a practical matter, the national labor relations policies would be fragmented if, depending on location, carriers subject to the Railway Labor Act would be subject to different challenges based upon different state statutes of limitations that might be analogous, or applied. This would result in not only Balkinzation of rights but undermining of the national labor policy. Cases interpreting the preemptive effect of the supremacy clause suggest that if there are constitutional considerations, they mandate the application of a national uniform policy for our labor laws when it comes to selection of the limitations period and preclude the type of revisiting of fragmented policy argued for by Plaintiffs. *See, Del Costello,* 462 U.S. 163.

CONCLUSION

For the foregoing reasons, the Cross-Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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September 7, 1990